89- 1388

Supreme Court, U.S.
FILED
FEB 26 199
JOSEPH F. SPANIOL
CLERK

No.

In The
Supreme Court of the United States
October Term, 1990

JONATHAN C. SCOTT,

Petitioner,

vs.

DREAMLITE HOLDINGS LIMITED, KORITZA INVESTMENTS LIMITED, ALAN LAWSON and PAUL ADAMS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JONATHAN C. SCOTT
Petitioner, Pro-se
P.O. Box 2260
St. James, New York 1780
(516) 584-7777

Dick Bailey Printers. 203 Richmond Avenue ■ Staten Island, New York 10302
Tel.: (212) 608-7666 — (718) 447-5358 — (516) 222-2470 — (914) 682-0848

52 P

QUESTIONS PRESENTED

1. Whether it is the United States Court of Appeals for the Federal Circuit or the United States Court of Appeals for the Second Circuit which is vested with appellate jurisdiction over an appeal from an interlocutory order withdrawing the reference of a Chapter 11 bankruptcy case pending in the Eastern District of New York, lifting an automatic stay upon ex-parte application and allowing the provisional common law remedies of seizure and attachment under New York State law?

2. Whether or not a United States District Court, presiding over a pre-petition civil action, properly lifted the automatic stay under the bankruptcy code and properly allowed the provisional remedies of seizure and attachment of property against parties and non-parties upon an ex-parte application?

3. Whether or not an attorney may be adjudged personally liable for an adversary's legal fees where the arguments raised on appeal were warranted and fully supported by existing law or a good faith argument for extension or modification thereof and where the factual assertions had a proper basis?

4. Whether or not notice and an opportunity to be heard is due an attorney as a matter of law and Constitutional right before he may be adjudged personally liable for an adversary's legal fees and double costs on appeal, fixed by the Court in the amount of $47, 926.50?

5. Whether or not under the circumstances here, a Court may prohibit an attorney, under threat of proceedings to disbar or suspend him, from filing papers with the Court authorized by the Federal Rules of Appellate Procedure, unless and until liability for the adversary's attorney's fees, the amount of which is undetermined, is paid in full and satisfactory proof of said payment is provided to the Court, without consideration of the disproportionate amount sought as fees in relation to the work performed and without consideration of counsel's financial ability to pay said fees, later determined by the Court to be in the amount of $47,926.50?

6. What is the extent of an attorney's personal financial

liability for prosecuting an appeal denominated by the Court of Appeals as frivolous where there was no showing that the attorney's conduct multiplied the proceedings in the case unreasonably and vexatiously or incurred excess costs, expenses or unnecessary legal fees and/or that the appeal taken was frivolous or unduly delayed the proceedings?

PARTIES

The defendant-appellants in the United States Court of Appeals for the Federal Circuit were Gary S. Kraser and Supercar, Ltd., the non-party appellants were Supercar International, Ltd. and Albert Yaboni, and the plaintiffs-appellees were Dreamlite Holdings, Ltd., Koritza Investments Limited, Alan Lawson and Paul Adams. Petitioner JONATHAN C. SCOTT was the attorney for the appellants in the Federal Circuit.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTIONAL STATEMENT 4

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 4

STATEMENT OF THE CASE 8

REASONS FOR GRANTING THE PETITION. 22

I. THIS CASE PRESENTS A DISPUTE OVER THE APPELLATE JURISDICTION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT. 22

(continued)

TABLE OF CONTENTS

II. THIS CASE PRESENTS ISSUES OF EXCEPTIONAL IMPORTANCE WHICH IMPLICATE AND CALL FOR THIS COURT'S EXERCISE OF ITS POWERS OVER THE FEDERAL JUDICIARY. 23

III. THE PETITION SHOULD BE GRANTED BECAUSE THE APPEAL BELOW PRESENTS THE ISSUE OF A CONFLICT BETWEEN THE PROVISIONS OF THE BANKRUPTCY CODE AND THE ORDERLY PAYMENT AND ADJUSTMENT OF CLAIMS AND INCONSISTENT COMMON LAW REMEDIES OF SEIZURE AND ATTACHMENT. 28

CONCLUSION 30

APPENDIX A.1

January 26, 1989 order of the United States District Court, EDNY A1

November 28, 1989 decision of the United States Court of Appeals, Federal Circuit A.5

January 16, 1990 order of the United States Court of Appeals, Federal Circuit A.12

TABLE OF AUTHORITIES

Cases:

Alessi et al. v. Raybestos-Manhattan, Inc., et al., 451 U.S. 504 (1981) 28

Bradley v. Campbell et al., 832 F.2d 1504 (10th Cir. 1987) 25

Christianson et al. v. Colt Industries, 486 U.S. ____,100 L.Ed2d 811 (1988) 3, 23

Cooter & Gell v. Hartmarx et al., ____ U.S. _____ (Cert. Granted, October 1989 term) 24

Franco v. I.N.S., 748 F.2d 518 (9th Cir. 1984) 26

Growney Equipment v. Shelley Irrigation Development, 834 F.2d 833 (9th Cir. 1987) 25

Hair v. Pangilinan, 816 F.2d 1341 (9th Cir. 1987) 26

In Re Baldwin United , 765 F.2d 343 (2d Cir. 1985) 10, 23

Knorr Brake Corp. v. Harbil, Inc., 738 F.2d 223 (7th Cir. 1983) 26

Oliveri v, Thompson, 803 F.2d 1265 (2d Cir. 1986) 24

TABLE OF AUTHORITIES

Overnite Transportation Co. v. Chicago Industrial Tire Company, 697 F.2d 789 (7th Cir. 1983)	25
Parratt v. Taylor, 451 U.S. 526 (1981)	25
Roadway Express v. Piper, 447 U.S. 752 (1980)	24
Suslick v. Rothschild Securities Corp. et al., 741 F.2d 1000 (7th Cir. 1984)	25
Statutes and Rules:	
United States Constitution, 5th Amendment	4
11 U.S.C. Section 362	4, 5, 28
28 U.S.C. Section 157(d)	6
28 U.S.C. Section 1254 (1)	4
28 U.S.C. Section 1292 (c)	6
28 U.S.C. Section 1927	6, 13, 17, 25
38 U.S.C. Section 283	11
38 U.S.C. Section 4092	27
Rule 38, Federal Rules of Appellate Procedure	6, 11, 13
Rule 64, Federal Rules of Civil Procedure	7
N.Y. Civil Practice Law and Rules Section 6201	7

TABLE OF AUTHORITIES

N.Y. Civil Practice Law and Rules Section 7102 7, 8, 17

Rule 19(1), Rules of the Supreme Court of the United States 11

Rule 47.9, Rules of the United States Court of Appeals, Federal Circuit 12

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1990

JONATHAN C. SCOTT,

Petitioner

vs.

DREAMLITE HOLDINGS LIMITED,
KORITZA INVESTMENTS LIMITED,
ALAN LAWSON and PAUL ADAMS,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Attorney JONATHAN C. SCOTT (SCOTT or appellants' counsel) respectfully petitions this Court to issue a Writ of Certiorari to review a decision rendered November 28, 1989 by the United States Court of Appeals for the Federal Circuit (Federal Circuit) and to review an order entered by that same Court on January 16, 1990. The Federal Circuit awarded sanctions comprised of attorney's fees and double costs amounting to $47, 742.50 and $184.00 respectively against JONATHAN C. SCOTT as counsel for prosecuting a civil appeal and prohibited counsel, under threat of disbarment or

suspension, from filing any papers with the Court in relation to the appeal or in relation to the application for attorney's fees. This award was made without counsel being provided with notice or an opportunity to be heard, either prior to or after the time that the award was made. Adversary counsel neither sought nor requested any sanction against petitioner.

In the November 28, 1989 decision affirming an ex-parte interlocutory order entered against counsel's clients Gary S. Kraser, Supercar, Ltd., Supercar International, Ltd. and Albert Yaboni, the Federal Circuit awarded double costs and attorney's fees against appellants' counsel in an amount to be fixed in the future and directed that the Clerk not accept any papers for filing by JONATHAN C. SCOTT until the fees and costs awarded are paid in full and satisfactory proof of full payment is provided to the Clerk. In the January 16, 1990 order, the Federal Circuit enforced the prohibition against filing papers in relation to the appeal or the application for attorney's fees under threat of proceedings by the Court to disbar or suspend counsel and approved adversary counsel's application on behalf of Dreamlite Holdings, Ltd., Koritza Investments, Ltd., Alan Lawson and Paul Adams for attorney's fees without any hearing in the amount of **$47,742.50** as attorney's fees for the preparation of a 40 page appellees' brief in an appeal from an ex-parte order, for argument of the appeal and for the preparation of routine motions.

OPINIONS BELOW

On January 26, 1989, the United States District Court, Eastern District of New York signed an ex-parte order, *inter alia*, granting the common law remedies of seizure and attachment against an individual defendant, Gary Kraser, a corporate defendant, Supercar, Ltd., a Chapter 11 debtor in possession, and against Supercar International and Albert Yaboni, non-parties to the action. (A.1-A.4). That order was not officially reported.

Appeals were taken by the aforementioned aggrieved parties to the United States Court of Appeals for the Second Circuit, encompassing the Eastern District of New York *and* to the United States Court of Appeals for the Federal Circuit. The United States Court of Appeals for the Second Circuit allowed the appeal to be withdrawn at a pre-argument conference without prejudice to reinstatement within 20 days of a determination that the Federal Circuit did not have subject matter jurisdiction over the appeal. [1]

On November 28, 1989, the Federal Circuit affirmed the order appealed from in a scathing decision released for publication and held appellants' counsel JONATHAN C. SCOTT personally liable for attorney's fees and double costs of the appellees. The Court directed that the Clerk not accept any papers for filing by JONATHAN C. SCOTT unless and until the amount of sanctions fixed by the Court was paid in full and satisfactory proof was provided to the Court (A. 6, 11). That decision has not yet appeared in the Federal Reporter.

On January 16, 1990, the United States Court of Appeals for the Federal Circuit fixed attorney's fees in the amount of $47, 742.50 against JONATHAN C. SCOTT and appellants and admonished counsel not to file any papers in relation to the appeal or to the application for attorney's fees unless and until the amount fixed and $184.00 as double costs is paid in full and that any filings would subject to JONATHAN C. SCOTT to suspension or disbarment proceedings (A. 12-14).

---

1. Notices of appeal to both Court of Appeals were filed by petitioner because of the uncertainty as to which Court had jurisdiction over the appeal and in order to avoid the circumstance confronted by the parties in the case of *Christianson et al. v. Colt Industries*, 486 U.S. ___, 100 L.Ed2d 811 (1988) in which they were shuttled back and forth from the Circuit Court of Appeals in the District and the Federal Circuit.

JURISDICTIONAL STATEMENT

This petition seeks review of a decision and order of the United States Court of Appeals for the Federal Circuit, rendered November 28, 1989 and January 16, 1990. The present petition was filed within 90 days of November 28, 1989. This petition is timely in accordance with the rules of this Court.

The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

"No person shall be deprived of life, liberty or property without due process of law."

2. Title 11 U.S.C. § 362, provides in pertinent part:

*** A petition filed *** operates as
a stay, applicable to all entities, of-

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title or to recover a claim against the debtor that arose before the commencement of the case under this title:

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the state;

(6) any act to collect, assess or recover a claim against the debtor that arose before the commencement of the case under this title

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying or conditioning such stay-

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) With respect to a stay of an act against property under subsection (a) of this section if-

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization

(f) Upon request of a party in interest, the Court, with or without a hearing, shall grant such relief from a stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section-

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in the property; and

(2) the party opposing such relief has the burden of proof on all other issues.

3. Title 28 U.S.C. § 157 (d), provides:

The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the

proceeding requires consideration of both title 11 *** and other laws of the United States regulating organizations or activities affecting interstate commerce.

4. Title 28 U.S.C. § 1292 (c) provides, in pertinent part:

The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction-

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title ***.

5. Title 28 U.S.C. § 1927, provides

Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the Court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of said conduct.

6. Rule 38, Federal Rules of Appellate Procedure, entitled "Damages for Delay" provides:

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to appellee.

7. Rule 64, Federal Rules of Civil Procedure provides, in pertinent part:

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the

circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time that the remedy is sought ***.

8. New York Civil Practice Law and Rules Section 6201 provides in pertinent part:

An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:

(3) the defendant with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property or removed it from the state or is about to do any of these acts.

9. New York Civil Practice Law and Rules Section 7102, provides in pertinent part:

(a) Where the plaintiff delivers to a sheriff an affidavit, order of seizure and undertaking and, if an action to recover a chattel has not been commenced, a summons and complaint, he shall seize the chattel in accordance with the provisions of the order and without delay.

(c) The affidavit shall clearly identify the chattel to be seized and shall state:

1. that the plaintiff is entitled to possession by virtue of the facts set forth;

2. that the chattel is wrongfully held by the defendant named;

3. whether an action to recover the chattel has been commenced, the defendants served, whether they are in default, and, if they have appeared, where papers may be served upon them;

4. the value of each chattel or the class of chattels claimed, or the aggregate value of all chattels claimed; and

5. if the plaintiff seeks the inclusion in the order of seizure of a provision authorizing the sheriff to break open, enter and search for the chattel in the place where the chattel may be, facts sufficient under the due process of law requirements of the fourteenth amendment to the constitution of the United States to authorize the inclusion in the order of such a provision.

(e) Undertaking. The undertaking shall be executed by sufficient surety, acceptable to the court. The condition of the undertaking shall be that the surety is bound in a specified amount, not less than twice the value of the chattel stated in the plaintiff's affidavit***.

STATEMENT OF THE CASE

Petitioner JONATHAN C. SCOTT is a twenty-six year old attorney and solo-practitioner initially admitted to the practice of law in the State of New York on September 30, 1987 whose practice focuses mainly upon appellate advocacy. Petitioner also is a member of state bars of Connecticut and Pennsylvania and is admitted to the United States Court of Appeals for the Second, Third and Federal Circuits. Petitioner is a panel attorney on the United States Court of Appeals for the Second Circuit. More than eighty percent of petitioner's practice is devoted to the provision of advocacy on behalf of indigent criminal defendants in federal and state Courts on a pro-bono basis or at a statutory fee of $40.00 per hour. Petitioner maintains a modest office located in one room contained within his parent's home. The record shows that petitioner was retained by stockholders of Supercar, Ltd. to file a Chapter 11 bankruptcy proceeding in order to protect their interests.[2] Petitioner was paid the total sum of $6500.00 for such representation. Petitioner received no additional compensation

---

2. The stockholders of Supercar, Ltd. are comprised of small investors including senior citizens, some of whom reportedly invested their life savings in the company.

from the bankrupt debtor for prosecuting the subject appeal in the Federal Circuit. The appellants only paid the costs of filing the appeal and the printing costs and paid no legal fees to petitioner related to the appeal in the Federal Circuit.

The Federal Circuit, in the absence of notice to petitioner or an opportunity for him to be heard, entered an order imposing financial sanctions against him and the Court prohibited the Clerk from accepting any filings on behalf of petitioner unless and until the amount to be fixed as a sanction was paid in full and satisfactory proof was provided to the Court. The decision also accused the appellants and their counsel of demonstrating an unconscionable disregard for the judicial process. The decision was entered in a civil appeal taken by petitioner JONATHAN C. SCOTT as counsel on behalf of four appellants from an order of the United States District Court, Eastern District of New York. The order granted the remedies of seizure and attachment under New York law against two non-defendants. The Court allowed a seizure of property without the posting of a bond in the amount required by New York State common law and allowed such provisional remedies to be utilized in lieu of the provisions of the Bankruptcy code applicable to appellant Supercar, Ltd, a debtor in possession under Chapter 11 of the United States Bankruptcy Code. The Federal Circuit affirmed the order appealed from in a memorandum opinion. This the Court did without citing a single precedent of the Federal Circuit or of this Court addressing the merits of the claims raised on appeal. However, in the absence of precedent in the Circuit and in the absence of reliance upon precedents from other Circuits, the Panel hearing the appeal characterized the arguments raised as utterly devoid of merit (A. 9). This was a matter of first impression before the Federal Circuit and no warning was provided to petitioner that the Court would disagree with the arguments advanced in conformity with Second Circuit precedent.The Court suggested that appellees' brief fully supported the proposition that the appeal was

frivolous and was without merit. [3] Further, the Panel opined that the appeal was taken for the purpose of delaying compliance with a preliminary injunction order previously entered when the appeal had absolutely no impact upon such compliance nor was it shown that it was intended to delay compliance.

Prior to the determination of the appeal by the panel, the Federal Circuit granted a contested motion made by the appellants' for a stay of enforcement of the ex-parte order at issue. An order upon a emergency motion for a stay by appellants was granted by the Federal Circuit on February 3, 1989 by Chief Judge Markey. The Court ordered that:

(1) The District Court's order of January 26, 1989 is temporarily stayed pending opportunity for Dreamlite to file a response to this motion and consideration of all submitted papers by this Court.

(2) No further property shall be removed from defendants' premises and the property removed and placed in storage shall remain in storage pending further order of this Court (Exhibit B-Exhibits of Jonathan C. Scott in support of motion to strike application for attorney's fees) [4]

---

[3] A review of appellee Dreamlite's brief indicates that it relies upon half truths and full misrepresentations. At page 23 of its brief, Dreamlite cited *In Re Baldwin United*, 765 F.2d 343 (2d Cir. 1985) in support of the proposition that the District Court properly interfered with Supercar's bankruptcy proceeding, omitting any reference to the Second Circuit's holding in that case fully supporting Supercar's position that such an interference by the District Court with a Bankruptcy proceeding is improper.

[4]. In accordance with Rule 19 (1) of the Supreme Court of the United States, simultaneously with the filing of this petition, petitioner will request that the Federal Circuit certify and transmit the record since same is deemed by petitioner to be essential to this Court's determination of the issues presented

On March 14, 1989, a motion panel of the Federal Circuit, granted in substantial part appellants' motion for a stay of enforcement of the order pending appeal. This motion was granted despite the assertions by Dreamlite that the appeal was devoid of merit and that the defendants had violated the District Judge's prior preliminary injunction order (Exhibit B-Exhibits of Jonathan C. Scott in support of motion to strike application for attorney's fees).

Appellants' brief and appendix was timely filed in the Federal Circuit in accordance with the scheduling order. Dreamlite's counsel thereafter moved for and was granted an extension of time to file its brief on the basis that a partner in the law firm representing Dreamlite et al. would not be available to work on the appeal prior to the due date set by the scheduling order. Appellee's brief was filed on July 17, 1989, making appellants' reply brief due some fourteen days later. JONATHAN C. SCOTT moved for a one month extension in which to file a reply brief. Adversary counsel did not oppose the motion. The extension was sought and was granted on the basis that counsel was ill and recuperating from symptoms diagnosed medically as mononucleosis. The reply brief was timely filed despite counsel's disability.

Dreamlite thereafter filed a motion for sanctions under the Patent Laws of the United States (38 U.S.C. Section 283) and under Rule 38 of the Federal Rules of Appellate Procedure against the appellants Kraser, Supercar, Ltd., Supercar International, Ltd. and Albert Yaboni. Neither in the notice of motion nor anywhere in the supporting papers did Dreamlite request sanctions against appellants' counsel JONATHAN C. SCOTT. A memorandum opposing the request for financial sanctions against the appellants was timely submitted to the Federal Circuit. The Clerk's Office, construing the requirements of Federal Circuit Rule 47.9, refused to file the responsive

---

here.

papers, taking the position that a response would not be permitted unless asked for by the Court.

The appeal was set down for argument on October 7, 1989. Prior to that date counsel advised the Clerk of the Court that the appellants would submit the appeal without oral argument for reason of counsel's infirmities and resulting inability to travel from New York to Washington. By letter dated September 28, 1989, the Court confirmed that only the appellee would argue the appeal. Oral argument was presented by Dreamlite's counsel and the appellants' position was taken on submission. Appellant Kraser observed the oral argument and reported to counsel that two matters had arisen at oral argument as to which there appeared to be confusion. One of the Panel Judges noted the motion for sanctions against appellants was before the Court but that it had not received responsive papers on behalf of the appellants. [5] Counsel for Dreamlite acknowledged receipt of responsive papers on behalf of the appellants. In addition, Dreamlite's counsel reportedly argued that Supercar International, Ltd., was incorporated for the specific purpose of circumventing the preliminary injunction. JONATHAN C. SCOTT, believing himself duty bound as an officer of the Court to clarify these issues, forwarded a letter to the Court, resubmitting the motion papers and the certificate of incorporation for Supercar International, Ltd. This communication was made on notice to adversary counsel, who availed themselves of an opportunity to respond.

On November 28, 1989, the Federal Circuit entered an order affirming the appeal and imposing sanctions. In an opinion which could only be characterized as a scathing condemnation of the conduct of appellants in the Court below and of counsel before the Federal Circuit, the Court decided to also hold petitioner jointly and severally liable for Dreamlite's

---

5. The Panel Judge apparently was unaware of the fact that the Clerk's Office had refused to file the responsive papers and had adopted the position that they were only to be filed if the Court so requested.

attorney's fees. The Court took the unprecedented action of prohibiting the filing of any papers by petitioner or by appellants unless and the sanctions to be awarded, yet unspecified as to amount, were paid in full and satisfactory proof of payment in full was supplied to the Court.

As to the merits, the same Court which had previously granted a contested stay of enforcement of the order appealed from on behalf of the appellants', denominated the same appeal to be utterly devoid of merit. The Court based this conclusion upon its opinion that the appellees' brief fully explored all of the appellant's contentions and purportedly established the lack of any basis for the appeal. The Court granted financial sanctions comprised of attorney's fees against petitioner, relying upon 28 U.S.C. Section 1927 and a Federal Circuit decision relying upon Rule 38 of the Federal Rules of Appellate Procedure.

By notice of motion dated December 4, 1989, petitioner sought an emergency order in the Federal Circuit staying publication of the Federal Circuit's opinion. The motion recited that the decision contained numerous factual errors, that the restriction against filing additional papers without consideration of counsel's ability to pay constituted an unconstitutional denial of access to the Courts guaranteed by the United States Constitution and that the appeal was not taken in bad faith and was supported by the law and the facts. In addition, counsel noted that the language in the opinion, referring to an unconscionable disregard for the judicial process was unjustified and threatened to irreparably harm petitioner's status and reputation as an attorney as well as his pending application for admission to the bar of the State of Florida. By an entry made on the notice of motion, the Court denied the application on December 18, 1989 without opinion or explanation.

On or about the same date, Dreamlite sought an extension of time to file its bill of costs, alleging that it needed time to prepare its fee application and to review billing data. Petitioner opposed this application and suggested to the Court that there is substantial reason to doubt the accuracy of a claim for attorney's

fees involving a relatively uncomplicated appellees' brief where it is not supported by contemporaneous time records. The Federal Circuit nevertheless granted Dreamlite's motion.

Within 14 days of the Federal Circuit's decision, petitioner JONATHAN C. SCOTT submitted a motion for rehearing and suggestion for rehearing in banc. In this application, petitioner sought rehearing on the grounds that: it presented issues of precedent setting importance concerning: 1) what process is due an attorney as a matter of statutory law and as a matter of right before he or she may be subjected to monetary sanctions and prohibited from filing; 2) what process is due an attorney as to the determination of the amount of sanctions to impose and consideration of counsel's ability to pay; 3) under what circumstances and upon what authority does an attorney become liable for an adversary's double costs and attorney's fees; 4) if monetary sanctions are justified what is the appropriate amount of such a monetary sanction. In addition, counsel attempted to clarify the arguments made on appeal, demonstrating how statements denominated by the Panel opinion as misrepresentations were in fact proper representations. The petition for rehearing showed that:

The essence of the appeal before the Federal Circuit concerned the scope, proposed basis and propriety of an order issued by the District Court ex-parte, which, inter alia:

1. Ordered an attachment of property under New York law against two non-parties to the underlying lawsuit and a corporation before the United States Bankruptcy Court under Chapter 11 of the United States Bankruptcy Code.

2. Ordered the seizure of property of Supercar, Ltd., the corporation in bankruptcy and/or of Supercar, International, a non party, under the New York State provisional remedy.

3. Lifted the stay of proceedings and against the transfer of property under the United States Bankruptcy Code on an ex-parte application, without notice to the debtor, the creditors in

interest and the United States Trustee acting in the Supercar case.

4. Ordered the respondents to show cause why they should not be directed to deliver product molds by a date certain, relief previously granted by the District Court on the injunction and the subject of a separate and distinct appeal at the time of the entry of the order at issue below on January 26, 1989.

5. Provided for a seizure and attachment of property in the total amount of $500,000.00 (Five Hundred Thousand Dollars) upon a previously placed security bond in the amount of only $50,000.00 (Fifty Thousand Dollars).

The subject appeal did not contest the power of the District Court Judge to enforce/coerce compliance with the Court's orders by the use of the power of civil contempt. Nor did the subject appeal contend that the Judge could not consider whether there was a basis to strike the defendants' answer, based upon DREAMLITE's allegations that defendants had not cooperated in discovery.

The petition for rehearing below demonstrated that the Panel opinion was based upon certain erroneous factual determinations which may have contributed or more than likely did contribute to an erroneous determination. For example, 1) the Court opined at A. 7 that Kraser is the sole shareholder of Supercar, when in fact there are more than 5 additional shareholders (Albert Yaboni, Jr., Albert Yaboni Sr., Helen Yaboni, John Novinski, Sal Mondrone, Valerie and William King) all residents of the State of New York (as indicated in Supercar's bankruptcy petition), who invested close to half a million dollars in the business venture and whose rights were substantially prejudiced by the District Court's order entered without notice or an opportunity for said shareholders to be heard and 2) the Court opined at pg. 8 that the Court ordered expedited discovery on October 14, 1988 (the actual date is November 14, 1988) because of Kraser's repeated delays in complying with discovery requests, when the record shows that

expedited discovery was ordered to permit Dreamlite to examine Kraser under oath in connection with the conflicting affidavits and allegations involving Dreamlite's motion to hold Kraser and Supercar in contempt, there being no discovery requests outstanding. In addition, counsel submitted that the Panel misconstrued some of the arguments raised by the appellants.

The Court interpreted the appellant's brief as making a claim that the District Court lacked jurisdiction to issue the January 26, 1989 order after a notice of appeal was filed from the prior order granting the preliminary injunction. Appellants' brief did not assert the position that the filing of a notice of appeal divests the District Court of the power to enforce its own orders in the absence of a stay under the Federal Rules of Appellate Procedure. It was argued in good faith that a District Court may not, under the guise of enforcing its own orders, be asked to grant relief the subject of a pending appeal so as to circumvent the efficacy of the right to appellate review. In this case, it was argued by appellants below that the District Court's preliminary injunction order dated October 14, 1988 and subject to review on appeal, directed the turn over of certain product molds even though same was not requested in the moving papers. Dreamlite sought in the January 26, 1989 order to have Judge Nickerson re-order that the product molds be turned over, thereby circumventing meaningful review on appeal. There is a substantial distinction between a District Judge's power and authority to enforce his own orders and his authority to grant for the second time the same relief which is subject to review on a pending appeal.

The Panel construed appellants' brief as advancing the argument that the District Judge had no power to enforce his own order against Supercar International and against Albert Yaboni. It is respectfully submitted that this construction misconstrues appellants' position. The argument advanced by counsel was that the District Court Judge erroneously ordered the provisional remedies of seizure and attachment against non-parties. This distinction is a substantial one since the basis

cited by Dreamlite to support its application, the provisional remedy provided under New York law State, would not have been available to Dreamlite had this action been filed in a New York State Court. There is absolutely no reason why a pre-judgment attachment provided under the law of a state should be available in the Federal Courts where the application of that law by the state Court to the same facts presented would have resulted in such attachment being vacated or denied outright for failure to allege the proper elements. Nor is it insignificant that New York law only permits an attachment against the property of a defendant, where the record here shows that neither Supercar International, Ltd. or Albert Yaboni were defendants. Further, it is not insignificant that New York law required as a condition of procuring an order of seizure an undertaking or a bond in an amount equal to at least twice the value of the property authorized to be seized. Accordingly, under New York law [6], the bond requirement would have been at least one million dollars instead of $50,000.00 or some twenty-times the amount required as security by the District Court.

The Panel cited no cases or statutory authorities in its opinion concerning the merits of the appeal but reached the conclusion that the appeal was without even a colorable basis. The Court cited 28 U.S.C. Section 1927 as the statutory basis for an award of sanctions. The Panel did not find that the authorities relied upon in appellants' brief and table of authorities were inapplicable or that the principles for which they were cited were improper or erroneous. The Panel concluded that counsel acted in bad faith in prosecuting the appeal, without a hearing of any sort to permit counsel to demonstrate that he exercised the highest possible level of good faith in prosecuting the appeal. Counsel respectfully submits that the conclusion that he acted in bad faith is premised on an erroneous interpretation of the record and the arguments advanced.

---

[6] N.Y. CIVIL PRACTICE LAW AND RULES Section 7102 (e).

The Panel referred to five specific contentions made in the appellants' brief in the statement of facts, characterizing them as misrepresentations (A. 10). The first two statements characterized as a misrepresentation were that Dreamlite Holdings had no permission to use the tradename "Dreamlite" and that the tradename was misappropriated by Lawson and Adams. As to the name "Dreamlite", judicial notice can be taken that the ownership of the trademark name as shown in the records of the United States Patent and Trademark Office belongs to Dreamlight Enterprises, Ltd., the predecessor to Supercar, Ltd., a corporation owned by Gary Kraser. Neither the records of the United States Patent and Trademark Office or the record in this case indicate that the trademark name "Dreamlite" was sold or transferred to Dreamlite Holdings, Ltd., thereby supporting the first two statements itemized by the Federal Circuit.

The Panel characterized as a misrepresentation the third statement that Dreamlite Holdings, Ltd. was filed in the Jersey Islands for the purpose of avoiding the tax laws of the United States (A. 10). Kraser asserted that Lawson and Adams insisted that no offices be shown to exist either in the United States or in London. This way all business functions would appear as if conducted offshore in the Channel Islands, avoiding United Kingdom and United States taxes. While this contention cannot be shown in the record, it must be noted this statement was fairly advanced as a contention of appellants. The reason that such a contention cannot be affirmatively established in the record is that appellants were not granted a hearing although same was requested.

The Panel characterized as a misrepresentation the fourth statement that there was no showing that Gary Kraser was notified that stock for which he was to be the beneficial owner could be delivered to a nominee (A. 10). This contention was fully justified since there is no proof of notice to Gary Kraser that his stock was being held by a nominee. In addition, the document found by the Federal Circuit to be a valid licensing

agreement required the delivery of stock to Gary Kraser and not to any nominee.

The Panel characterized as a misrepresentation the fifth statement that physical delivery of an executed licensing agreement was never made. The Court classified this contention as a misrepresentation even though there was no dispute that an executed licensing agreement was never physically delivered. Counsel's position and argument on this point is not inconsistent with the Federal Circuit's finding that a facsimile of a copy of a document is a valid license.

Lastly, the Panel misconstrued appellants' statement that Kraser was examined under oath on four occasions during discovery (Appellant's brief, p. 14) as advancing an argument that Gary Kraser had cooperated in the discovery process. Further, the statement that Gary Kraser was examined under oath on four occasions was interpreted by the Panel as confronting and characterizing as a misstatement appellees' contention that Gary Kraser had not cooperated in the discovery process. The statement in appellants' brief is accurate and does not even confront the issue of whether there was or was not cooperation in discovery since it was irrelevant to the basis of the appeal. The allegation of failure to disclose only arose in connection with that branch of DREAMLITE's motion which was to strike the answer and counterclaim and for an award of judgment (A. 2, para, 5). That issue was not ruled upon by the District Court and accordingly would not be the proper subject of review on appeal.

As to the statements characterized by the Panel as misrepresentations and confronted above, counsel argued that even if it were assumed for the sake of argument that these statements were unsupported by the record, in no event could appellees have sustained any injury as legally irrelevant contentions do not require a substantial reply and Dreamlite posited in its motion for sanctions against appellants only that these contentions were irrelevant to the appeal.

Counsel's timely filed Petition for Rehearing and

Suggestion for Rehearing In Banc was returned to counsel by the Clerk of the Court unfiled, ***on the basis that a copy of the opinion upon which rehearing was sought was not attached***. A corrected petition was immediately forwarded to the Clerk of the Court, who rejected same on the basis that the petition was ***now out of time***. A motion for leave to file the petition less than one week out of time was denied by the Chief Judge without opinion.

Dreamlite's application for attorney's fees in responding to the purported "frivolous" appeal, claimed the expenditure of more than 300 hours of attorney's time. The application relied upon a purported unverified and unsworn "schedule" allegedly representing a compilation taken from Dreamlite's counsel's time records. An award in the amount of $52,776.44 was sought by Dreamlite's counsel. The application itself contained entries claiming that Dreamlite's counsel spent more than forty hours from November 28, 1989 to December 15, 1989, after learning that attorney's fees were granted, preparing and revising the fee application and supporting schedules. It is claimed that it took close to a week to prepare the application despite Dreamlite's counsels representation to the Federal Circuit that its time records were maintained on a computer by the firm's accounting department.

A close analysis of the claim revealed that:

1) More than $6800.00 was sought to prepare the fee application.

2) Attorneys shown and listed on the cover of the brief as acting of counsel for Dreamlite did not have any time attributed to them on the schedule supporting the application.

3) Attorneys not listed on the brief as acting of counsel or appearing on any papers or correspondence, claimed to have devoted at least 37 hours to the preparation of the brief.

4) For telephone communication with Dreamlite concerning the appeal, $1850.00 was sought.

5) The 12 "new" cases cited in the appellees' brief were at a per case charge of $4300.00 per precedent located and cited.

6) That major portions of the brief were "cut" and "pasted" from a prior separate and distinct appeal in which a request by Dreamlite for sanctions was denied and from an earlier memorandum.

7) That more than $5000.00 was sought to prepare the motion for sanctions against appellants, a document substantially similar to the motion papers submitted in the related case before the Federal Circuit for sanctions and denied in the previous Federal Circuit case.

8) Between two routine motions, for sanctions and an application for attorney's fees, an award of almost $12,000.00 was sought.

9) For Dreamlite's counsel to decide whether or not to argue the appeal, $500.00 was sought.

10) To prepare for a fifteen minute oral argument, more than $2000.00 was sought.

11) For oral argument of the appeal, the first matter on the Federal Circuit's calendar, $3646.25 was sought. Upon information and belief, the argument took less than twenty minutes.

More significant than the indication that Dreamlite's application was based upon an unsworn schedule, was not supported by contemporaneous time records and was indicative

of massive overreaching on the part of Dreamlite's counsel was the discovery by JONATHAN C. SCOTT from a review of the schedule that Dreamlite's 's counsel sought an award of fees for ***"contacts with defendant"***."This entry indicated that Dreamlite's counsel had been communicating directly with appellants, without counsel's knowledge or consent. Counsel confronted Gary Kraser and was advised by him that indeed Dreamlite's lead attorney William Lawrence had been communicating with him directly while the appeal was pending. Letters and a settlement agreement drafted by Dreamlite's counsel and forwarded directly to Mr. Kraser were submitted to the Federal Circuit (Exhibit G, I) in support of counsel's motion to strike the application for attorney's fees on equitable grounds. The Federal Circuit rejected this claim by counsel as well as the argument that the application was not based upon contemporaneous time records but instead was predicated upon massive overreaching and misrepresentations of time expended-more than 300 hours claimed-where petitioner's experience supports the belief that the time claimed was multiplied eight times beyond the actual time needed for such a research and writing project.On January 16, 1990 the Court fixed fees on the appeal in the amount of $47, 742.50.

REASONS FOR GRANTING THE PETITION.

I. THIS CASE PRESENTS A DISPUTE OVER THE APPELLATE JURISDICTION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

It is submitted that this petition should be granted because this case presents a conflict between the Federal Circuit's exclusive jurisdiction over matters arising under the patent laws of the United States and the exclusive jurisdiction of the Circuit Courts of Appeal in the District where the Bankruptcy Court is

located to hear and determine appeals from orders lifting an automatic stay. In *Christianson v. Colt Industries, et al.*, 486 U.S. ____, 100 L.Ed.2d 811 (1988), this Court granted certiorari to review such a conflict between the Federal Circuit and the Seventh Circuit.

The issue of whose Circuit's law should apply to this case is of exceptional importance to the other issues presented here because Second Circuit authority was supportive of counsel's arguments that the District Court abused its discretion in allowing such an interference with the Supercar Bankruptcy [7] and that the subject appeal was not frivolous in any way but instead followed Second Circuit authority.

II. THIS CASE PRESENTS ISSUES OF EXCEPTIONAL IMPORTANCE WHICH IMPLICATE AND CALL FOR THIS COURT'S EXERCISE OF ITS POWERS OVER THE FEDERAL JUDICIARY.

It is submitted that this petition should be granted because this case presents issues involving the uniform enforcement of the United States Code and the Federal Rules of Appellate procedure concerning financial sanctions and the standard of conduct of the Federal bar. In addition, this case presents an important issue concerning the use of the Court's injunctive powers to deny a litigant access to the Courts. The chilling effect that a $47,926.50 financial sanction will have on an attorney, especially one such as the petitioner, who was not even compensated for handling the appeal and whose practice focuses upon the provision of legal services to indigent defendants cannot be ignored. The Federal Circuit apparently gave no consideration to the fact that petitioner would have to work almost 1200 hours to earn fees from the State and the Federal Government at the designated rate of $40.00 per hour for representing indigent defendants in order to pay the amount of

---

7. *In Re Baldwin United*, 765 F.2d 343 (2d Cir.1985)

the fees awarded here. Nor did the Court consider that the major portion of petitioner's two and one half year old law practice is comprised of providing services on a pro-bono basis or on a reduced fee basis to disadvantaged litigants. The Second Circuit, by contrast, in the case of *Oliveri v. Thompson*, 803 F.2d 1265, 1281 (2d. Cir 1986) held that the attorney's ability to pay an award should be considered in making an equitable determination of counsel's liability. Respectfully, petitioner submits that an attorney who provides for the poor should not be disabled or even financially ruined by an unwarranted sanction.

Nor can the damage to a young attorney's professional reputation as a result of being accused by a Court of making numerous misrepresentations and showing an unconscionable disregard for the Court's authority be ignored especially where counsel was precluded by the Court from demonstrating that such a characterization was unjustified. In *Cooter & Gell v. Hartmarx et al.* (October Term 1989), the Court granted certiorari this past term to review a decision of the United States Court of Appeals for the District of Columbia Circuit which upheld sanctions imposed against counsel for bringing an action and which sanctioned counsel again for exercising a right to appeal even though there was no authority in the Circuit upholding such an award and the Circuit Courts were split as to the issues presented.

This case presents important issues concerning what process is due an attorney before he or she is subject to financial sanctions, the question of the equities to be considered in arriving at the amount to award and the questions of under what circumstances does counsel become liable for an award of sanctions under the various statutory provisions in the Federal statutes and rules providing for such remedies.

The Federal Circuit's decision below, upholding sanctions against petitioner without notice or an opportunity to be heard, is contrary to this Court's decision in *Roadway Express Inc. v. Piper*, 447 U.S. 752, 757 (1980), the decision of the Ninth

Circuit in *Growney Equipment v. Shelley Irrigation Development,* 834 F.2d 833 (9th Cir. 1987) and the decision of the Tenth Circuit in *Bradley v. Campbell et al.*, 832 F.2d 1504 (10th Cir. 1987), which recognized that notice and an opportunity to be heard is the process due an attorney under the Constitution before any sanction is awarded. In addition, the Federal Circuit's decision to award sanctions without any notice or an opportunity to be heard is contrary to the legislative history surrounding 28 U.S.C. Section 1927 as amended in 1980 to authorize an award of attorney's fees. The Conference Report at page 8 indicates that an attorney is entitled to all appropriate protections of due process available under the law.

In *Parratt et al. v. Taylor,* 451 U.S. 526 (1981) a post-deprivation remedy to redress the loss of a $23.50 hobby kit by a prisoner was found to satisfy due process. In the present case, a liability of almost $48,000.00 has been fixed against an attorney who received no pre-deprivation notice or hearing and was prohibited from even making any application to the Federal Circuit after the award was fixed, under threat of commencement of disbarment or suspension proceedings. Petitioner, deprived of an opportunity for any other redress, prays that this Honorable Court will provide him with an opportunity to vindicate cherished Constitutional rights. Petitioner hereby submits that he lacks the financial ability to pay the award given to appellees by the Federal Circuit Court of Appeals and that if he is required to do so a substantial negative impact on the indigent clients he routinely represents will result.

The Circuit Courts are not in agreement as to the standards of conduct which subject an attorney to liability under Section 1927, nor is there an agreement of the extent of counsel's liability. *Suslick v. Rothschild Securities Corp. et al.*, 741 F.2d 1000 (7th Cir. 1984) (showing of subjective bad faith required); *Overnite Transportation Co. v. Chicago Industrial Tire Company,* 697 F.2d 789 (7th Cir. 1983 (claim, although rejected on the merits is not frivolous where it presented issue of first impression to tribunal and filing of second action in Federal

Court after dismissal of state Court action on same grounds held not to constitute multiplication of proceedings); *Franco v. I.N.S.*, 748 F.2d 518 (9th Cir. 1984) (arguments, although rejected as groundless did not subject attorney to liability under Section 1927 since the appeal was not taken for the purpose of delay); *Knorr Brake Corp. v. Harbil, Inc.*, 738 F.2d 223 (7th Cir. 1983) (even if claim is found meritless, no liability unless argument lacked justification, was implausible and liability may only be sustained if supported by an adequate record); *Hair v. Pangilinan*, 816 F.2d 1341 (9th Cir. 1987) (no liability for sanctions for argument not wholly without merit).

In the case at bar, it is submitted that the award of sanctions was unjustified and inappropriate. The arguments advanced on appeal were fully supported by legal authorities in the Circuit where the District Court and the Bankruptcy Court were located as well as by the plain language of the statutory provisions involved. There were no precedents in the Federal Circuit rejecting these arguments in prior decisions. The fact that the Federal Circuit granted a motion to stay enforcement of the order appealed from after full consideration of all arguments and then adopted the position that the appeal was utterly devoid of merit, is contradictory on its face and is strongly suggestive of the proposition that the imposition of sanctions was not guided by the Court's evaluation of the merits but rather upon an unwarranted determination to punish an honest and hard working young attorney for representing unpopular clients alleged to have disobeyed a preliminary injunction entered by a District Court Judge. In addition, the Federal Circuit's refusal to allow petitioner to be heard and its approval of a claim for attorney's fees which were apparently excessive also support such a proposition. It is submitted that the petition should be granted here because a liability for sanctions should not be based upon the whim or pleasure of the Court but rather upon

established and clearly defined standards of conduct. [8] Attorneys should not be expected to operate in a vacuum wherein there are no defined requirements as to what is expected of them. If Federal Courts can impose an onerous financial burden on young attorneys in the form of sanctions in the absence of clearly defined standards and awarded without warning, notice or an opportunity to be heard, Petitioner fears that it will not be long before young lawyers will routinely reject assignments before Federal Courts. Further, Petitioner fears that if the decision and order of the Federal Circuit is allowed to stand in this case, confidence in the Federal Judiciary by the practicing bar will be substantially diminished. Respectfully, Petitioner submits that the lifeblood of the law is creativity, developed in the minds of advocates who dare to be enthusiastic enough to prosecute their clients' cause to the maximum extent possible under the law. To stifle such noble efforts would cause the law to stagnate, fail to change with changing times and would be counterproductive to the preservation of liberty, equality and justice.

Petitioner earnestly urges this Court to review the appellants' brief that was submitted to the Federal Circuit and believes that this Court will be convinced of the merits of the appeal if not that the Federal Circuit lacked jurisdiction over the appeal in the first instance. Certainly, even if this Court were to approve of the action taken by the District Court Judge against the appellants, it is submitted that this Court would not find that

---

8. The need for uniform standards in the Federal Circuit is especially necessary now in light of the substantial expansion by Congress of the Court's jurisdiction to include the determination of appeals by disabled American Veterans (38 U.S.C. Section 4092) and the issues here are likely to recur over and over again in the future. It is submitted that matters of first impression will reach the Federal Circuit regularly. Further, it is expected that if the decision here stands, Veterans advocates will be sufficiently intimidated so that a highly vulnerable and deserving group of disabled American Veterans will be without legal representation.

appellants' brief was "utterly devoid of merit" as the Federal Circuit opined. In addition, the Federal Circuit premised liability upon the theory that the appeal had the purpose of delaying the resolution of the proceedings in the Court below, ignoring the fact that 1) JONATHAN C. SCOTT had withdrawn as counsel for appellants in the District Court before prosecuting the appeal; 2) the proceedings in the Court below were delayed not as a result of petitioner's conduct but at the request of counsel for Dreamlite (See Exhibit I to Exhibits of Jonathan C. Scott). Petitioner submits that at all times his purpose was to accelerate the resolution of the proceedings as his main clients were in bankruptcy and the assets needed to re-organize had been seized by appellee Dreamlite.

III. THE PETITION SHOULD BE GRANTED BECAUSE THE APPEAL BELOW PRESENTS THE ISSUE OF A CONFLICT BETWEEN THE PROVISIONS OF THE BANKRUPTCY CODE AND THE ORDERLY PAYMENT AND ADJUSTMENT OF CLAIMS AND INCONSISTENT COMMON LAW REMEDIES OF SEIZURE AND ATTACHMENT.

It is respectfully submitted that the petition should be granted because this case presents an important issue concerning a disputed claimant or a disputed creditors' right to employ common law pre-judgment remedies in a pre-petition civil action stayed under 11 U.S.C. Section 362, contrary to the provisions of the Bankruptcy Code on an ex-parte application to attach and seize property belonging to the Bankrupt Estate, to the prejudice of other creditors and parties in interest before the Bankruptcy Court.

In *Alessi et al. v. Raybestos-Manhattan, Inc., et al.*, 451 U.S. 504 (1981), this Court granted a petition to review the question of a conflict between state law and the Federal Employee Retirement Income Security Act of 1974. This Court held that the State law provision was preempted by federal law.

It is submitted that in the case before the Federal Circuit, Dreamlite's assertion of rights based upon common law remedies of seizure and attachment under New York law were preempted by the Bankruptcy Code with respect to the seizure and attachment of Supercar's property. Under the circumstances presented here, the Federal Circuit Court of Appeals should not have found that appellants' brief was frivolous or that appellants' counsel was jointly and severally liable with a bankrupt entity for a $47, 926.50 sanction which had to be paid before any further motions for relief would be entertained by the Court.

CONCLUSION

For the foregoing reasons, it is earnestly urged that the petition for a writ of certiorari to review the decision and order of the Federal Circuit should be granted, along with such other and further relief awarded to petitioner as this Court may deem just and proper.

Dated: St. James, New York
February 20, 1990

Respectfully submitted,

JONATHAN C. SCOTT
Petitioner, pro-se
P.O. Box 2260
St. James, N.Y. 11780
(516) 584-7777

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

DREAMLITE HOLDINGS LIMITED,
KORITZA INVESTMENTS LIMITED,
ALAN LAWSON and PAUL ADAMS,

Plaintiffs,

v.

GARY S. KRASER, and
SUPERCAR LIMITED,

Defendants.

----------X

ORDER OF SEIZURE, ATTACHMENT AND IMPOUNDMENT AND ORDER TO SHOW CAUSE WHY AN ORDER SHOULD NOT BE ENTERED HOLDING DEFENDANTS, SUPERCAR INTERNATIONAL AND YABONI IN CONTEMPT OF THE COURT'S ORDER OF OCTOBER 14, 1988, HOLDING KRASER IN CONTEMPT OF THE COURT'S ORDER OF NOVEMBER 18, 1988, AND PROVIDING LEAVE TO PLAINTIFFS TO AMEND COMPLAINT.

Upon the declarations of Joseph Aglione, Paul Adams, Arnold Dompieri and Gil Lobell, plaintiffs' supporting memorandum and exhibits thereto, and upon all the prior pleadings and proceedings herein, it is hereby ordered as follows:

ORDER TO SHOW CAUSE

That Gary S. Kraser (hereinafter "Kraser"), Supercar, Ltd. (hereinafter "Supercar"), Supercar International Ltd. (hereinafter "Supercar International"), and Albert Yaboni (hereinafter "Yaboni") show cause before the Hon. Eugene H. Nickerson, U.S. District Judge, courtroom 11, U.S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York 11201 on the 15th day of February, 1989 at 11:30am of that date, or as soon thereafter as counsel can be heard, why an order should not be entered:

(1) holding Kraser, Supercar, Supercar International and Yaboni in contempt of the Court's preliminary injunction order of October 14, 1988;

(2) holding Kraser in contempt of the Court's discovery order of November 18, 1988;

(3) fining Kraser, Supercar, Supercar International, and Yaboni for their contemptuous conduct in an amount adequate to compensate plaintiffs for their damages, including the profits of Kraser, Supercar, Supercar International and Yaboni from this conduct, awarding plaintiffs their costs and attorney's fees, and imposing other appropriate sanctions on Kraser, Supercar, Supercar International and Yaboni until they comply with the Court's orders;

(4) ordering Kraser to deliver to plaintiff's attorney's on or before the 15th day of February, 1989 at 11:30am all lighters, parts, toolings, product molds and other property relating to the manufacture, promotion and sale of lighters covered by U.S. Patent No. 4,522,583;

(5) rendering judgment by default against Kraser, dismissing his counterclaim and awarding plaintiffs their reasonable expenses, including attorneys' fees, incurred in taking his deposition and seeking this order;

(6) granting plaintiffs leave to file a Second Amended Complaint, inter alia, adding Supercar International and Yaboni to this action;

(7) confirming the relief set forth in this order; and

(8) granting such other and further relief as the Court deems just and proper; and it is further

ORDERED, that the U.S. Marshall for the Eastern District of New York, or one or more of his deputies, or a police officer for Suffolk County, New York, or the Stonegate Agency, Inc., a private investigatory firm, through one of more of its employees, be and they hereby are, authorized and directed to search the business premises located at 9C Mahan Street, West Babylon, New York 11704, together with any motor vehicles, desks, cabinets, closets or other enclosures located in or on such premises, using, if necessary, reasonable force to gain entry to such premises, motor vehicles, desks, cabinets, closets or other enclosures, and seize forthwith and deliver to plaintiffs' counsel, pending further order of this court:

all books, records, lighters, parts, toolings, product molds, product prototypes, product displays, promotional materials and all other documents, records or property relation to the manufacture, promotion or sale of miniature automobile cigarette lighters, including all such documents or records that are computerized and a personal computer located on such premises; and it is further

ORDERED, that all bank accounts and other property of Supercar, Kraser, Supercar International and Yaboni, including all accounts at Citibank and Roosevelt Savings Bank, be attached to the extent of five hundred thousand dollars until further order of this Court and that plaintiffs or their representatives may serve this order of attachment; and it

is further

ORDERED, that the automatic stay under the Bankruptcy Code, 11 U.S.C. § 362, applicable to Supercar be lifted, pro tanto, to effectuate this order; and it is further

ORDERED, that the bond of $50,000 previously posted by plaintiffs in this matter on October 20, 1988 shall also serve as bond for this order; and it is further

ORDERED, that the Clerk shall file this order, and the memorandum, exhibits and declarations in support thereof, under seal, and shall maintain them under seal, until February ___, 1989; and it is further

ORDERED, that service of this order, together with the supporting memorandum, exhibits and declarations referred to above, shall be deemed good and sufficient if personally served on Supercar, Kraser, Supercar International, and Yaboni, or their attorney's, or on an officer, agent or other person legally qualified to receive service on their behalf, on or before the --- day of February, 1989 at ---pm; and it is further

ORDERED, that answering papers, if any, shall be served upon the attorneys for plaintiffs be delivering copies thereof to their offices on or before the 7th day of February, 1989 at 5pm.

Dated: Brooklyn, New York

S/Hon. E.H.Nickerson

January 26, 1989

Issued at: 2:51 pm

United States Court of Appeals for the Federal Circuit

89-1324

DREAMLITE HOLDINGS LIMITED,
KORITZA INVESTMENTS LIMITED,
ALAN LAWSON and PAUL ADAMS,

Plaintiffs-Appellees,

v.

GARY S. KRASER and SUPERCAR LIMITED,

Defendants-Appellants,

SUPERCAR INTERNATIONAL, LTD.,
and ALBERT YABONI,

Appellants.

Mary Ann Mullen, Curtis, Morris & Safford, P.C., of New York, New York, argued for plaintiffs-appellees. With her on the brief were William F. Lawrence and Pasquale A. Razzano.

Jonathan C. Scott, of St. James, New York, submitted for defendants-appellants.

Appealed from: U.S. District Court for the Eastern District of New York

Judge Nickerson

United States Court of Appeals for the Federal Circuit

89-1324

DREAMLITE HOLDINGS LIMITED,
KORITZA INVESTMENTS LIMITED,
ALAN LAWSON and PAUL ADAMS,

Plaintiffs-Appellees,

v.

GARY S. KRASER and SUPERCAR LIMITED,

Defendants-Appellants,

SUPERCAR INTERNATIONAL, LTD., and ALBERT YABONI,

Appellants.

DECIDED: November 28, 1989

Before MARKEY, Chief Judge, FRIEDMAN, Senior Circuit Judge,[1] and MAYER, Circuit Judge.

MARKEY, Chief Judge.

Gary S. Kraser (Kraser), Supercar Limited (Supercar), Supercar International, Ltd. (International) and Albert Yaboni

---

[1] Judge Friedman took senior status on November 1, 1989.

(Yaboni) appeal from an enforcement order of the United States District Court for the Eastern District of New York (Nickerson, J.), No. CV-88-2957, lifting an automatic stay of proceedings against Supercar and granting remedies of seizure an attachment. Dreamlite Holdings Limited, Koritza Investments Limited, Alan Lawson and Paul Adams (collectively Dreamlite) seek costs and attorney fees. We affirm the order appealed from and impose sanctions.

I. BACKGROUND

Kraser is the director and sole shareholder of Supercar. On September 20, 1988, Kraser incorporated International. Yaboni is an employee of both corporations. International is the alter ego of Supercar, operation on the same business purpose of manufacturing and selling lighters disclosed and claimed in United States Patent No. 4,522,583 ('583).

On September 23, 1988, Dreamlite sued Kraser and Supercar for: (1) breach of exclusive license agreements; (2) tortious interference with those agreements; (3) breach of fiduciary duty; and (4) declaratory judgment of license validity. On October 3, 1988, Dreamlite added a patent infringement claim.

On October 14, 1988, the district court enjoined Kraser and Supercar from infringing the '583 patent. Dreamlite Holdings Limited v. Kraser, 705 F. Supp. 98, 9 USPQ2d 1401 (E.D.N.Y. 1988), aff'd, 878 F. 2d 1446 (Fed. Cir. 1989) (unpublished). That injunctive order further prohibited certain specified conduct and mandated the delivery of certain specified property to Dreamlite.

On October 30, 1988, Kraser and Supercar appealed from the injunctive order. This court affirmed on June 15, 1989.

Kraser and Supercar simply disregarded the injunctive order. They continued to engage in the prohibited conduct and

did not deliver the property. Supercar filed for bankruptcy, and Kraser substituted International in the role previously played by Supercar. Dreamlite hired an investigator, Joseph Aglione, who reported by affidavit that International was using was using Supercar's business address, Supercar's employees (Yaboni in particular), and Supercar's phone listing. Representing himself as a carwash owner, Aglione met with Yaboni, who sold him infringing lighters and offered him an exclusive distributorship for the Staten Island area. Yaboni told Aglione that International is wholly owned by Kraser, is licensed under the '583 patent, and has the sole business purpose of manufacturing and selling the lighters.

Kraser and Supercar also disregarded court orders compelling discovery. After Kraser's repeated delays in complying with discovery requests, the district court ordered expedited discovery on October 14, 1988. Kraser refused to bring requested documents to his deposition and refused to answer questions before and after being directed to do so by the court.

Upon motion with accompanying affidavits, the district court on January 26, 1989 entered an enforcement order providing, inter alia, for seizure of certain materials including:

all books, records, lighters, parts, toolings, product molds, product prototypes, product displays, promotional material and all other documents, records or property relating to the manufacture, promotion or sale of miniature automobile cigarette lighters, including all such documents that are computerized and a personal computer located on such premises to the extent that it contains records relating to the foregoing

and for attachment of:

all bank accounts and other property of Supercar, Kraser, Supercar International and Yaboni, including all accounts at

Citibank and Roosevelt Savings Bank... to the extent of five hundred thousand dollars until further order of this court.

To the extent necessary to effectuate its enforcement order, the district court lifted the automatic stay otherwise shielding Supercar as a petitioner in bankruptcy. The court also made the $ 50, 000 bond posted in relation to the injunctive order applicable to its enforcement order.

II. OPINION

Appellants proffer numerous arguments, all utterly devoid of merit. Shorn of hyperbole and duplication, appellants' arguments are:

1) the district court lacked jurisdiction to issue its enforcement order after notice of appeal of the injunctive order; 2) the district court lacked the power to lift the stay triggered by the bankruptcy proceeding; 3) Dreamlite failed to show cause for lifting that stay; 4) Dreamlite failed to show irreparable damage; 5) lifting the stay without notice deprived appellants of due process; 6) remedies pursuant to state law conflict with and are preempted by bankruptcy law; 7) the district court lacked power to enforce its injunction against nonparties International and Yaboni; and 8) Dreamlite's $50, 000 bond is insufficient.

Dreamlite's brief fully explored each of appellants' arguments, explicating the lack of support for each in the record and the absolute absence of support for each in the law, and irrefutably demonstrating the frivolity of this appeal. Appellant's reply brief improperly repeats the arguments in their main brief and ignores rather than counters Dreamlite's assertions on the facts and the applicable law. Having carefully considered all that has been presented on both sides in light of the entire record, we see no need for lengthy discussion here of appellants; arguments but deem it sufficient to refer appellants to Dreamlite's brief.

Among the numerous facts relied upon by the district court is issuing its enforcement order, and simply ignored here by appellants, perhaps the most glaring is appellants' disobedience of the injunctive order. Nowhere do appellants deny that they continued selling lighters in violation of the injunction and nowhere do they even attempt to challenge the evidence of their intransigence.

Additionally, appellants have attempted throughout to mislead this court. Using half truths and direct misstatements of fact, appellants have demonstrated an unconscionable disrespect for this court and for the judicial process. Among appellants' misrepresentations shown by the record to be unsupported and untrue are: 1) Dreamlite has no permission to use "Dreamlite"; 2) "Dreamlite" was misappropriated by Lawson and Adams; 3) Dreamlite is a corporation formed by Lawson and Adams to avoid taxes; 4) the record contains no indication that Kraser was notified that stock could be delivered to a nominee in the Channel Islands; 5) the record contains no indication of delivery of an executed licensing agreement.

One of appellants' few attempts to respond to Dreamlite's assertions further illustrates their willingness to abuse the judicial process through attempts to trick and mislead this court. Dreamlite said Kraser had not cooperated with discovery orders. Appellants responded, repeatedly, with the bald statement that Dreamlite was misstating because "Kraser was examined four times." The record clearly establishes that four examinations were required precisely because of Kraser's repeated and continued-to-this-day refusals to answer proper questions and to produce discoverable documents.

After oral argument had been rescheduled to accommodate him, appellants' attorney failed to appear for argument before this court. The attorney thereafter, without leave, circumvented the rules of this court by lodging a letter

concerning Dreamlite's oral argument.

That appellants found it necessary to misrepresent the facts and the law confirms the frivolousness of this appeal. Fully aware of the seriousness of that appellation, we have looked in vain for even a colorable basis on which it could be said that the appeal had some chance of success or involved a good faith effort to change the law.

Filing and prosecuting this frivolous and vexatious appeal had, and from its outset could only have had, the effect of continuing appellants' campaign of noncompliance with legitimate orders of the district court. That noncompliance has now been continued since October 14, 1988 and must stop.

Accordingly, we award to Dreamlite its attorney fees and twice its costs expended in responding to this appeal. Fed. R. App. P. 38; 28 U.S.C. § 1927 1982; see Amstar Corp. v. Envirotech Corp., 730 F. 2d 1476, 1486, 221 USPQ 649, 657 (Fed. Cir.), cert. denied, 469 U.S. 924 (1984). Appellants and their attorney, Jonathan C. Scott, are jointly and severally liable to Dreamlite for the award. See Porter v. Farmers Supply Serv.,Inc., 790 F. 2d 882, 887, 229 USPQ 818, 818 (Fed Cir. 1986). Further filings on behalf of appellants or their attorney will not be accepted until the award is paid in full and satisfactory proof thereof has been furnished to this court.

CONCLUSION

The order appealed from is affirmed in all respects. Appellants and Jonathan C. Scott are jointly and severally liable to Dreamlite for the latter's attorney fees and double its costs expended in connection with this appeal.

AFFIRMED

United States Court of Appeals for the Federal Circuit

89-1324

DREAMLITE HOLDINGS LIMITED,
KORITZA INVESTMENTS LIMITED,
ALAN LAWSON and PAUL ADAMS,

Plaintiffs-Appellees,

v.

GARY S. KRASER and SUPERCAR LIMITED,

Defendants-Appellants,

SUPERCAR INTERNATIONAL, LTD.,
and ALBERT YABONI,

Appellants.

Before MARKEY, Chief Judge, FRIEDMAN, Senior Circuit Judge, and MAYER, Circuit Judge.

MARKEY, Chief Judge.

ORDER

Appellants, via their counsel Jonathan C. Scott, have continued to file numerous documents with this court, notwithstanding the absence of payment of attorney fees and costs jointly and severally imposed on appellants and their attorney in this court's opinion. Dreamlite Holdings Ltd. v. Kraser, No. 89-1324 (Fed Cir. November 28, 1989). The most recent of such documents is a "Motion to Strike or Deny Dreamlite's Application for Attorney's [sic] Fees and Expenses" filed on December 26, 1989. The motion is

accompanied by a twenty-seven page "Declaration" and 186 pages of "Exhibits".

In that motion, Jonathan C. Scott made numerous misstatements and insupportable assertions based on conjecture and innuendo which could have been avoided by a mere phone call to opposing counsel. Two examples are: 1) that Dreamlite's application is unsupported by the statement under oath required by this court's Rule 47.9; and 2) the application shows that Dreamlite's counsel made contacts with Scott's client without notice to Scott. The truth, readily ascertainable by phone, is that Dreamlite's application as filed was supported by the required statement and that the listings of contacts with "client" referred to contacts with clients of Dreamlite's counsel.

Accordingly, IT IS ORDERED THAT:

(1) Jonathan C. Scott shall desist from filing in this court any further papers relating in any manner to this appeal or to the imposition of attorney fees and double costs, jointly and severally, on Jonathan C. Scott and appellants;

(2) Any disregard of paragraph (1) of this Order shall result in an order upon Jonathan C. Scott to show cause why he should not be suspended or disbarred forn the bar of this court;

(3) Dreamlite's application for attorney fees is approved in the reduced amount of $47,742.50; Jonathan C. Scott and appellants are jointly and severally liable for payment to Dreamlite of that amount;

(4) The Clerk has assessed double costs in the amount of $184.80; Jonathan C. Scott and appellants are jointly and

severally liable for payment to Dreamlite of that amount.

January 16, 1990

---

s/

HOWARD MARKEY
Chief Judge